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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 972

PAUL BURKE,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered on December 10, 1962 (R 174). Rehearing was denied on January 7, 1963 (R 177).

Opinions Below.

The opinion of the Supreme Court of Arkansas (R 168-173) was rendered on December 10, 1962. The order denying rehearing was rendered on January 7, 1963. Both are printed in Appendix B hereto, infra. pp. 21 and 27.

Jurisdiction.

The jurisdiction of this Court is invoked under and by virtue of the Fourth and Fourteenth Amendments to the Constitution of the United States. The federal questions sought to be reviewed here were raised in the trial court (R 6, 7) by a "Motion to Quash Information Filed Against Him," by a "Motion to Quash Indictment" (R 8), by a "Motion for New Trial" (R 12, 13, 14, 15); and by a "Motion for a Directed Verdict" (R 118). These motions were considered by the Court previous to beginning the trial before the jury and at each proper point (R 22, 30, 118). The trial court, which was the Circuit Court of Sevier County, Arkansas, overruled the motions made by the petitioner. These motions were made by a pleading in the form of a motion.

Further objections made to the attempts of the prosecution to introduce the evidence obtained by the search and seizure are reflected throughout the transcript of record of the trial. Exceptions were duly saved each time the Court overruled the petitioner's objection. Further assignments of error were made by said petitioner when he raised his objections to instructions (R 145, 146). These were objections made to instructions actually given by the Court. In his "Motion to Quash Information Filed Against Him" (R 6), petitioner specifically alleged that the basis of the charge was evidence illegally obtained and seized by officers in violation of the Fourth Amendment to the Constitution of the United States. By his other motions petitioner raises similar objections based upon the Fourth and Fourteenth Amendments to the Constitution of the United States.

In the Appellate Court, the Supreme Court of Arkansas, the federal questions sought to be reviewed were raised by virtue of argument and his "Bill of Exceptions" to that effect contained in petitioner's brief prepared for the Supreme Court of Arkansas. This highest Appellate Court of the State of Arkansas recognized that these points, involving a federal question, were raised by the petitioner by virtue of that court's reference to petitioner's third point (R 170, 171, 172). The third point alleged that the conviction had been based upon evidence seized in violation of the Fourth Amendment to the Constitution of the United States.

Questions Presented.

1. Whether the petitioner's conviction in a state court on a felony charge may be maintained upon evidence obtained by state weight division officers in an unlawful search and seizure.

2. Whether the stopping of petitioner's automobile by state weight division officers and their forceful search of such automobile constituted an unreasonable search and seizure.

3. Whether the failure of the state weight division officers to first obtain a search warrant before searching petitioner's automobile constituted an unlawful search and seizure.

Amendments to Constitution, Statutes and Regulations Involved.

Amendments IV and XIV of the United States Constitution are set forth in the Appendix of this petition at p. 20.

Statement.

This proceeding was begun in the typical manner by a trial in the Circuit Court of Sevier County, Arkansas. This Court allowed the introduction into evidence, in the face of timely and proper objections, certain bottles and liquids alleged to be moonshine whiskey. This evidence was seized from the trunk of petitioner's wife's automobile during a search made upon such vehicle (R 34, 35). The search was made without making any attempt to obtain a warrant (R 36).

Petitioner was a passenger in the automobile which his wife had loaned to one Gerald Oglesby (R 113, 114, 115, 119). Oglesby had invited petitioner to ride with him on a trip (R 134). Oglesby and petitioner were riding down the highway apparently violating no laws of the State of Arkansas, when officers of the weights and standards division of the State Department of Revenue, who were checking truck traffic (R 31) saw petitioner pass by in a car (R 32).

At the time that these officers noticed petitioner pass by in an automobile the officers were busy preparing to weigh a truck which had just pulled off the road at the point where the weight and standards officers were set up. The officers testified that they only viewed the automobile for a few seconds (R 37). They proceeded to "check this car out" (R 32, 33, 34).

When the officers stopped the car, they first proceeded to demand the driver's licenses of both the driver and of the petitioner herein, who was a passenger in the automobile (R 53, 54). Both the driver and his passenger were found to have in their pos-

session currently valid driver's license. Nowhere does the record reflect any alleged traffic law violations. Then after devoting considerable time to examining aforesaid licenses, one of the officers demanded that they be given the keys to the trunk in order to search it (R 34). After the third demand petitioner directed the driver to let the officers have the keys (R 34).

Upon opening the trunk the officers found a quantity of liquid in jars which they later testified to be moonshine whiskey (R 35). This identification was strictly based upon testimony concerning its smell (R 72). Petitioner was never arrested nor was any charge filed against him until after the search and seizure. His conviction was based upon the evidence obtained as a result of the search of the trunk.

The petitioner was charged with possession of intoxicating liquor for sale in a dry county (R 3). He was found guilty in the Circuit Court of Sevier County. He appealed from this conviction to the Supreme Court of Arkansas and that court affirmed the verdict of guilty found by the trial court (R 168, 173). Petitioner thereupon obtained a recall of mandate and a stay of execution (R 181), and now brings his case to this court, seeking a petition for a writ of certiorari to the Supreme Court of the State of Arkansas.

Decision of the Supreme Court of Arkansas.

In affirming the Circuit Court of Sevier County, Arkansas, the Supreme Court of Arkansas held that the evidence was sufficient to sustain a conviction when the only testimony identifying the liquid seized from the trunk of the car as moonshine whiskey was witnesses' opinion based upon smell.

The Supreme Court of Arkansas held that the evidence seized when the automobile was searched without a warrant was admissible in evidence. In holding this, the Court rejected petitioner's contention that evidence so seized constituted an unreasonable search and seizure in violation of petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States of America.

Reasons for Granting the Writ.

1. Petitioner's civil rights were violated by the unlawful search and seizure by the officers.

2. Petitioner's conviction was based upon evidence unlawfully obtained by an illegal search and seizure in violation of petitioner's rights.

3. The petitioner's right of privacy was invaded by the unreasonable search and seizure made by officers without probable cause.

ARGUMENT.

The stopping of the petitioner's automobile by state weight division officers and their forceful search of such automobile, constituted an unreasonable search and seizure, and the petitioner's conviction in a state court on a felony charge based upon evidence so seized was a violation of due process.

Only in certain well defined and specific situations have the courts found search to be reasonable when no valid search warrant was obtained prior to search. Those instances have been defined as follows:

1. Where voluntary consent was given prior to

the search, by either the individual or others authorized to speak for him. In the instant case, it is undisputed that consent was not given, but on the contrary officers demanded of the driver and also of the petitioner, the keys to the trunk upon three separate and distinct occasions (R 34); *U. S. v. Broadway Arrington*, 215 F. 2d 630 (C. A. Ill.) (1954).

2. Where the search was incident to a lawful arrest. In the instant case it is undisputed and the record so reflects that neither the petitioner nor the driver of the vehicle were committing any visible violation of the law, nor had a warrant of arrest been issued (R 37, 50, 52, 53); *U. S. v. Rabinowitz*, 339 U. S. 56.

3. Where the facts and circumstances within the officers' knowledge and of which they had reasonable trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been, or was being committed. This proposition is commonly referred to as "probable cause." It is upon this doctrine that the trial court admitted the alleged contraband in evidence in the trial of this case. *Brinegar v. U. S.*, 338 U. S. 160, and *Carroll v. U. S.*, 267 U. S. 132.

Petitioners made timely and proper objection to the introduction into evidence of alleged moonshine whiskey seized in an unlawful search and seizure (R 22, 34, 35, 36, 38, 70, 71, 72). In *Mapp v. Ohio*, 367 U. S. 643 (1961), this Court closed the final courtroom door for the use of such illegal evidence. In that case this Court held inadmissible as a violation of the Fourth Amendment to the Constitution of the United States, the use of evidence seized through illegal search and

seizure by state officers in state prosecutions. The Supreme Court there applied to prosecutions in state courts the federal exclusionary rule of *Weeks v. United States*, 232 U. S. 383 (1914). In the case at bar, Petitioner was apparently violating no weight or traffic law when the officers decided to "check him out" (R 34, 35, 36, 37, 38 and 53).

It would seem that if officers are permitted to stop vehicles traveling down the highway, that there must be some objective standard which could be applied by the officers to determine whether the facts known to them constitute a reasonable basis for a search. However, it is very difficult to formulate one all-inclusive test. The Supreme Court of the United States recognized the difficulty in establishing hard and fast rules when it stated in *United States v. Rabinowitz*, 339 U. S. 56 (1950), at 63:

> "What is a reasonable search is not to be determined by any fixed formula."

The same case further stated at page 63:

> "The recurring question of the reasonableness of searches must find resolution in the facts and circumstances of each case."

By virtue of the fact that it is impossible to develop one simple objective test of reasonableness or unreasonableness, it is necessary for this Court to examine the facts known to police officers preliminary to their stopping the automobile herein involved, before this Court can determine whether this search was reasonable or unreasonable (R 31, 32, 33).

Most state courts, as well as this Court, recognize

that if the officers viewing a fact situation have "probable cause" to know that goods, the possession of which are in themselves a crime, are present in a vehicle that the officers should be permitted to search the vehicle without first obtaining a search warrant. Whatever objective facts the Court ultimately determines must exist as a prerequisite for such a search the Court will designate as "probable cause." Therefore it is not enough for us to examine this case in general terms of "probable cause." But rather, this Court must examine the specific combination of facts known to the arresting officers at the time these officers observed this vehicle, at the time they determined to "check it out," and at the time they pursued and stopped this private automobile traveling down the public highway committing no visible violation of the law.

Various witnesses testified that petitioner had a "bad reputation" (R 47, 71 and 75). A fairly recent case dealt with unsavory reputations of premises. This case held that the fact that premises bore an unsavory reputation did not, of itself, authorize an exploratory search without a warrant, nor did it place the occupants of the premises beyond protection of this amendment prohibiting unreasonable searches and seizures. *Drayton v. United States*, 205 F. 2d 35, (1953). Other cases of this nature are *Harris v. U. S.*, 331 U. S. 145 (1946), and *U. S. v. 1013 Crates of Empty Old Smuggler Whiskey Bottles, etc.*, 52F 2d 49; *U. S. v. Kidd*, 153F Supp. 605.

The State Weight Division officers' assigned duty consisted of checking the weight, height, width, length, and fuel of trucks traveling upon the State Highways to determine whether such trucks are overweight, etc.

(R 31, 37, and 53). While engaged in checking the weight of a motor truck traveling on U. S. Highway #71 near DeQueen, Arkansas, these weight division officers stopped the petitioner's automobile which was being driven by a younger male companion. An explanation made by an officer for stopping the vehicle was that they thought the petitioner, who was not driving, was drunk. Just how such a conclusion could reasonably be reached is not explained. In any event, the unreasonableness of such contention is demonstrated by the fact that no charge of drunkenness was made against the petitioner (R 38 and 50). Petitioner submits, that perhaps the officers were not in fact motivated to "check him out" because as they said "he appeared to be drunk." This reasoning is sustained by the following testimony (R 51 and 52).

"Q. Who was actually driving?

A. Gerald Oglesby.

Q. And Mr. Burke was where in the car?

A. He was on the right-hand side.

Q. Do you mean to tell the jury you recognized Mr. Burke as being drunk when you only—

A. I didn't say he was drunk.

Q. You say he appeared to be drunk. Is that your testimony?

A. Yes. The way he was sitting in the car—

Q. How was he sitting?

A. He was slumped over toward the boy.

Q. Do you know whether he was asleep or awake?

A. No.

Q. *Then how come you to conclude that he was drunk?* (Italics ours.)

A. *With all this whiskey*— (Italics ours.)

Q. Isn't the reason why you say you had reason to think he was drunk was to get around a search warrant?

A. No, sir."

Now if the petitioner had been drunk, he would have been charged with drunkenness in order to substantiate officer's reason for stopping petitioner. The facts are that petitioner was not drunk, did not at the time appear to be drunk, and the above questions and answers indicate to any reasonable person that the arresting officers were fumbling for some peg to justify their harassment tactics. They had no knowledge, no tip, no prior information, or no reason at all, other than bare suspicion as a basis upon which to stop and search this automobile. This is clearly shown by the following testimony of one of the officers who made the search (R 53, 54):

"Q. What were you doing there on the highway?

A. To weigh and to check trucks, fuel tanks, over-length, weight and height—

Q. He didn't violate the law by failure to stop and be weighed, did he?

A. No, sir.

Q. And you didn't know at the time you rode down after him whether he had anything or not, did you?

A. No, I sure didn't.

Q. You just went after him and stopped him, didn't you?

A. Yes, sir.

Q. He didn't make any resistance, did he?

A. No.

Q. And he wasn't driving?

A. No.

Q. The first thing Captain Baker did, and the first thing that was down there, he asked for Oglesby's driver's license?

A. Yes.

Q. And did Oglesby have one?

A. Yes.

Q. Then you went around and asked for Mr. Burke's driver's license?

A. Yes, I got it.

Q. He had one?

A. Yes.

Q. There were no law violations there, were there?

A. No."

After stopping the vehicle the weight division officers quickly came to the point of their action by demanding that the driver and this petitioner exhibit their driver's license, even though one of the searching officers knew the petitioner personally and had no valid reason to examine petitioner's driver's license, as the petitioner was not operating the vehicle in

question, nor was there a need for identification of the petitioner if the officer, in truth and fact, knew him. The officers then demanded of the petitioner three times to hand over the keys to the trunk of the automobile (R 34, 35, and 41). With the use of these keys, so obtained by the use of force and their authority and contrary to the will of the petitioner, the weight division officers opened the trunk of the automobile and found what was alleged to be moonshine whiskey. It was this evidence upon which a charge was made against the petitioner, and he was convicted of a felony charge on the basis of the introduction of this alleged moonshine whiskey into evidence over timely and proper objections of the petitioner (R 34, 35, 36, 38, 42, 70, 71, and 72).

The Arkansas Supreme Court sustained the trial court's ruling that the alleged moonshine whiskey, obtained by the search and seizure by state weight division officers, should be allowed in evidence (R 168, 169, 170, 171, and 172).

The Arkansas Supreme Court cited *Carroll v. U. S.*, 267 U. S. 132 (1925), and *Brinegar vs. U. S.*, 338 U. S. 160 (1948), for a proposition that under the Fourth Amendment a valid search may be had without a warrant, but only if probable cause for search exists. *Carroll v. United States*, 267 U. S. 132, is distinguishable from the case at bar in that the Carroll case reflects a multitude of factors indicating "probable cause" were present; whereas, in the instant case, the officers were apparently on a fishing expedition and had merely a bare suspicion concerning petitioner's activities (R 32, 33, 36, 37, 39, 40, and 41).

In *Carroll v. United States*, 267 U. S. 132, the facts were: (1) That the officers making the arrest were regular alcohol tax agents and not weights and standards officers. (2) They were patrolling their regular area which was a strip of highway generally known to be the route used to run illegal whiskey into this country from Canada. (3) The car which was stopped and searched in the Carroll case, supra, was an "Olds Roadster" which was a car known by officers to be used to carry illegal whiskey, whereas the 1961 Chevrolet involved in the instant case had no such reputation, and the facts reflect that the officers had no knowledge of ownership or activity of said vehicle. (4) Further, in the Carroll case, the officers had personally discussed purchasing illegal liquor from these very men a short time before the car was stopped. Whereas, in the instant case, the primary factor seemed to be mere suspicion (R 32, 33).

That mere suspicion was not grounded in any factual knowledge whatsoever is clearly demonstrated by the fact that petitioner had been repeatedly stopped and searched on prior occasions, whenever and wherever he traveled the public highways, and officers had never found any indication of the presence of moonshine whiskey in petitioner's several vehicles (R 141, 142). Nor had officers uncovered one shred of evidence indicating that petitioners was engaged in the moonshine whiskey business (R 76, 77, and 142) at any time during the past three years despite the fact that the state's own witness, the Sheriff of Polk County (R 74) testified (R 76, 77, and 142) that his department had spent considerable time and effort in an attempt to acquire such evidence.

At no place in the record does it appear that officers

had probable cause legally justifying any of these searches made on petitioner's vehicles and premises, yet these searches were made with regularity and no incriminating evidence was uncovered (R 76, 77, 142, and 143). As a matter of fact, it seems that this stopping of Petitioner's wife's automobile just because an officer, not responsible for that area of law enforcement, saw petitioner out on the road was just an outward manifestation of a secret plot designed by the enforcement officers in the area to harass petitioner based upon officers' suspicion, but lack of knowledge concerning petitioner's activities. It is petitioner's contention that the law of searches and seizures was designed to stop just such harassment and premature violation of the individual's freedom to move about in the community until such time as officers have actual knowledge of a law violation and not a mere vengeful suspicion.

Petitioner attaches no significance to officer's testimony to the effect that petitioner's car appeared weighted down in the rear. The reason for this is because many things other than a load of moonshine could cause the rear of a car to ride low, such as a broken spring. Furthermore, it is inconsistent for the prosecution to rely on testimony concerning a weighted appearance of the car to establish probable cause when prosecution had called as their own witness an expert who testified that a car such as petitioner's equipped with road levelers, overload springs, and extra heavy duty shock absorbers will not go down in the rear when it is carrying heavy loads (R 88). The same witness for the state further testified (R 89) that farm people sometimes have such equipment installed when they carry feed in a vehicle. Petitioner testified (R 139) that he had had

the overload springs put on the car because he was carrying feed over country roads. Petitioner contends, that as a matter of law, that these facts do not indicate "probable cause."

The *Brinegar v. U. S.*, 338 U. S. 160 (1948), case relied upon so heavily by the Arkansas Supreme Court is one where even more factors were present than in the Carroll case, *Carroll v. U. S.*, 267 U. S. 132 (1925), and therefore is even less comparable to our present case.

In *Brinegar v. U. S.*, 338 U. S. 160, the distinguishing facts were: (1) That the officers making the search and arrest were federal alcohol tax unit officers, not state weights and standard officers; (2) They had personally seen Brinegar loading liquor into a car on at least two occasions during the preceding six months, whereas in the instant case, the officers had no first-hand information; (3) The highway on which Brinegar was arrested led from a known source of supply to a probable illegal market; and (4) The car which was stopped was driven by a person whom one of the officers had arrested personally five months earlier for illegally transporting liquor.

In *Draper v. U. S.*, 358 U. S. 307 (1958), the facts were that a paid informer tipped off officials concerning an alleged violator of narcotics laws. The officers acted upon this hearsay information and used that information to supply the "probable cause," making the subsequent search and arrest not unreasonable. In the majority opinion the Court seemed to be of the impression that petitioner therein was maintaining that the law should require that the quality of evi-

dence which is sufficient to establish probable cause should be that quality of evidence which would meet the tests of admissibility in trial. Petitioner herein does not maintain that evidence of so high a degree of probability should be required to be within the knowledge of arresting officers preliminary to search in order for them to have "probable cause" permitting a search. What petitioner does maintain is that as a prerequisite to a search, officers be required to have more than a knowledge of petitioner's former activities coupled with their suspicions concerning his present activities. In the *Draper v. U. S.*, 358 U. S. 307 (1958) case, it is true that officers had only hearsay information, but at least they were able to identify the source of this knowledge, and could have produced this person having the knowledge, and could have put him on the stand had he not died four days after the search. In the instant case, officers were permitted to testify concerning petitioner's reputation without either identifying the source of such information or without stating how the information came to their personal attention.

Petitioner earnestly maintains that such a state of facts should not be held to establish probable cause. In the instant case, the trial court advised the officers over the timely objection of petitioner's counsel that they were not required to state from what source the petitioner's alleged reputation was established. Certainly petitioner should be allowed to show by cross-examination, the reliability of this information when this information is being used to establish probable cause. This can only be done by an examination of the source of that reputation information, which the Court prohibited in the instant case, (R 75, 76). Petitioner is asking this Court to adopt a rule, for

determining probable cause at the inception of the search, which will prevent officers from having a "built in" perpetually available, legally acceptable excuse constituting probable cause, which is based solely on petitioner's alleged reputation. If this Court allows petitioner's reputation to constitute an acceptable basis for this search, then anyone with a bad reputation is subject to search at the whim of officers. Following such a theory, the Court will be compelled ultimately to hold such search reasonable anytime that the search discloses apparently incriminating evidence. We as citizens need this protection from persistent harassment, for no one is great enough to be beyond the hate of some official, nor small enough to be beyond the hate of some clerk. Examples of proof sufficient to establish probable cause would be inferences from suspicious acts, surreptitious passing of a package, or any number of such events coming to the knowledge of the officers. Petitioner submits that the better rule was stated in *Paldo v. United States*, 55 F. 2d 866 at 869 (CA 9 Cal.) (1932), where the Court said:

> "Mere suspicion is not enough; there must be circumstances represented to the officers through the testimony of their senses sufficient to justify them in a good faith belief that the defendant had violated the law."

The facts upon which this Court found "probable cause" to exist in the *Carroll*, *Brinegar* and *Draper* cases are shown to be far more than mere suspicion or a hunch by officers. *Carroll v. U. S.*, 267 U. S. 132; *Brinegar v. U. S.*, 338 U. S. 160; *Draper v. U. S.*, 358 U. S. 307. In the instant case, the weight division officers were pursuing a mere suspicion, as evidenced

by the fact that they had no positive information concerning petitioner's activities, despite the fact that officers had persistently scrutinized his activities for the past months. They actually were engaged in a fishing expedition. That mere suspicion is not a sufficient reason to permit such a search is demonstrated by a recent case in a United States District Court, *U. S. v. Kidd* (La.), 153 F. Supp. 605, at 609 (1957), in which the Court stated:

> "No general exploratory searches and seizures of either persons, houses or effects can ever be justified either with or without a warrant."

The sentence given the petitioner is short, but the principal is consequential. If the Supreme Court of Arkansas' order is permitted to stand, this petitioner will be deprived of liberty without due process of law in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. Yet of far greater importance is the precedent which this Court will hereby establish to be exercised in cases which only seem to be of more importance because they may involve a more severe penalty.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1, 1963.

APPENDIX A. Page i

Amendments to Constitution.

FOURTH AMENDMENT — The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT, SECTION 1 — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUPREME COURT OF ARKANSAS

No. 5049

PAUL BURKE, *Appellant*,

v.

STATE OF ARKANSAS, *Appellee*.

Opinion Delivered 12-10-62

APPEAL FROM SEVIER CIRCUIT COURT

HON. BOBBY STEEL, *Judge*.

AFFIRMED

JIM JOHNSON, *Associate Justice*.

This is an appeal from a conviction for possession of intoxicating liquor in dry territory for purposes of sale.

On February 9, 1962, Appellant Paul Burke, while riding as a passenger in an automobile driven by one Gerald Oglesby in Sevier County, was arrested by officers attached to the Weights and Standards Division of the Department of Revenues. Oglesby was driving south on Highway 71 about five miles south of DeQueen, where the officers were temporarily stationed, when he was stopped. After examining their drivers licenses, the officer in charge demanded the key to the trunk of the car, where they found nine cases of jars apparently containing whiskey. Appellant was charged with unlawfully possessing 54 gallons of intoxicating liquor in a dry county for purposes of sale, as a third offender, under the felony provisions of Ark. Stats. § 48-811.1. Upon conviction, he was sentenced to the penitentiary for one year. The

testimony is undisputed that Oglesby was not speeding or violating any other traffic laws when he was stopped, and it is also undisputed that the officers had no search warrant. One officer testified that the car looked heavily loaded and that he thought appellant was drunk, so they decided to "check the car." Both arresting officers testified that there was a strong smell of wildcat whiskey in and about the car, and that they knew appellant had a reputation for dealing in whiskey in Polk County.

Appellant relies on four points for reversal of his conviction. Appellant's first point is: The alleged prior convictions were under a different act and section of the statutes from the information in the instant case, and were for a different crime, that is, selling instead of possessing for purposes of sale. It is unquestioned that criminal statutes must be strictly construed in favor of the defendant, *Hughes v. State*, 6 A ' 131, I. Eng. 131, and in that vein we examine the statute under which appellant was convicted. From examination of the record, we are unable to determine under what specific statute the appellant's prior convictions were based, but we note that the convictions were subsequent to the passage of Act 395 of 1953 (Ark. Stats. §48-811.1) and appellant was charged and convicted of crimes which are crimes enumerated by this statute, *i.e.*, sale of intoxicating liquor or beverage. We are, therefore, unable to say that appellant was improperly charged under the felony provisions of Act 395.

Appellant's second point urged for reversal is that no competent proof was offered that the alleged liquor was intoxicating liquor prohibited by law. In the case at bar, the arresting officers and the sheriff of

Sevier County (who had custody of the nine cases from the time appellant was arrested) testified that they determined it was liquor from the smell. The cases of liquor were admitted into evidence at the trial. In *Burris v. State*, 172 Ark. 609, 290 S.W. 66, this Court stated:

> "Error of the court is assigned in permitting Witness Hayden to testify that he identified the liquor as whiskey by the smell. The opinion of the witness, based upon the smell of the liquor, was competent evidence, and its weight was a question for the jury. It cannot be said as a matter of law that the evidence of the identification of intoxicating liquor must rest upon more substantial basis than that of the sense of smell."

See also *Burns v. State*, 179 Ark. 1, 13 S.W. 2d 820; *Hunter v. State*, 180 Ark. 613, 22 S.W. 2d 40; *Freyaldenhoven v. State*, 217 Ark. 484, 231 S.W. 2d 121; *Fuller v. State*, 179 Ark. 913, 18 S.W. 2d 913; and 78 A.L.R. 439. The evidence was competent, and its weight was a question for the jury.

Appellant's third point, that the evidence was obtained by illegal search and seizure and should have been excluded, has given this court considerable concern. In *Clubb v. State*, 230 Ark. 688, 326 S.W. 2d 816, it was stated:

> "The right to be secure against unreasonable searches is guaranteed by Article 2, § 15 of our Constitution and also, in essentially the same language, by the 4th Amendment to the United States Constitution, yet our Court has followed a rule at variance with the Federal rule regarding the admissibility of evidence obtained by search without a warrant. *After careful consideration*

> *we have concluded that we will re-examine our former decisions in this connection with a view to changing our announced rule when the question is properly presented to us again.*" (Emphasis ours.)

In the light of this caveat, we have thoroughly examined the record and authorities cited and not cited by the parties. Two cases whic. are of compelling interest because of the similarity of the fact situations with the instant case are *Carrol v. United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L Ed. 543, and *Brinegar v. United States*, 338 U. S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879. In both cases the United States Supreme Court held that, under the Fourth Amendment, a valid search of a vehicle moving on a public highway may be had without a warrant, but only if probable cause for the search exists. The Court then went on to rule that the facts there presented amounted to probable cause for the search of the automobiles involved. In a careful and detailed analysis Chief Justice Taft in *Carroll v. United States*, *supra*, at p. 153, stated:

> "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, *as recognizing a necessary difference* between a search of a store, dwelling house, or other structure in respect of which a proper warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." (Emphasis ours.)

In the case at bar, the testimony of the officers as to the heavily loaded car, their knowledge of appellant's reputation as a known bootlegger, and the strong odor of wildcat whiskey in the car all add up to probable cause for the search. As was stated in *Carroll v. United States, supra*, and approved in *Brinegar v. United States, supra*:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search . . . But those lawfully within the county, entitled to use the public highways, have a right to free passage without interruption or search *unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.*" (Emphasis ours.)

Our *caveat* in *Clubb v. State*, supra, stated that "our Court has followed a rule at variance with the Federal rule regarding the admissibility of evidence obtained by search without a warrant." In the instant fact situation, our former decisions are *not* at variance with the Federal rule, and there is, therefore, no necessity here for re-examining our former decisions. To hold that this evidence is inadmissible would be to create still further variance with the Federal rule regarding admissibility of evidence obtained by search without a warrant. However, this shall in no way diminish our *caveat*.

The last point urged by appellant is that the remarks of the prosecuting attorney were prejudicial error.

In his closing argument, the prosecuting attorney apparently stated that the argument of appellant's counsel was misleading, to which appellant made timely objection. The Court sustained the objection and admonished the jury to base their verdict on the testimony as they gained it from the witnesses who testified and on the law as given them by the Court, and on those two things alone. He further instructed them to disregard anything that was not in the record that was mentioned by the attorneys. The balance of the prosecuting attorney's closing argument as transcribed was not such an expression of opinion of counsel as to be so flagrant as to deliberately, purposely and effectively arouse the passion and prejudice of the jury. As stated in *Adams v. State*, 176 Ark. 916, at p. 939, 5 S.W. 2d 946:

> "This court will always reverse where counsel go beyond the record to state facts that are prejudicial to the opposite party, unless the trial court, by its ruling, has removed the prejudice. *Hughes v. State*, 154 Ark. 621, 243 S.W. 70 (and other cases cited). But this court does not reverse for the mere expression of opinion of counsel in their argument before juries, unless so flagrant as to arouse passion and prejudice, made for that purpose, and necessarily having that effect."

Finding no error, we affirm.

IN THE SUPREME COURT OF ARKANSAS

OCTOBER TERM 1962 DECEMBER 10, 1962

PAUL BURKE, *Appellant*,

vs.

THE STATE OF ARKANSAS, *Appellee*.

APPEAL FROM SEVIER CIRCUIT COURT

Judgment.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Sevier County, and was argued by counsel; on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is, therefore, considered by the Court that the judgment of said Circuit Court in this cause rendered be, and the same is hereby, in all things affirmed with costs, and unless appellant shall, forthwith, surrender himself to the Supreme Court in execution of said judgment, his bond be declared as forfeited.

It is further considered that said Appellee recover of said appellant all her costs in this Court, in this cause expended, and have execution thereof.

December 10, 1962

IN THE SUPREME COURT OF ARKANSAS
OCTOBER TERM 1962

Proceedings of January 7, 1963

No. 5049

PAUL BURKE, *Appellant*,

vs.

THE STATE OF ARKANSAS, *Appellee*.

Order.

REHEARING DENIED

January 7, 1963

IN THE SUPREME COURT OF ARKANSAS
OCTOBER TERM 1962

Proceedings of February 4, 1963

No. 5049

PAUL BURKE, *Appellant*,

vs.

THE STATE OF ARKANSAS, *Appellee*.

Order.

Motion of appellant for recall of mandate and for stay of judgment pending certiorari proceedings in the Supreme Court of the United States is granted.

February 4, 1963